No. 95-1150

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

J.A. CROSON COMPANY,

Petitioner,

vs.

CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Madison County, Ohio, Twelfth Appellate District

BRIEF IN OPPOSITION FOR RESPONDENT THE CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT

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QUESTIONS PRESENTED

1. Where a non-union plumbing contractor had an equal bidding opportunity for a public school construction contract but failed to submit the lowest bid, does the National Labor Relations Act preempt the contractor's claim that the successful bidder violated a bidding affidavit by participating in a union "job targeting" program, where (a) the school board did not favor union or non-union bids and based its selection solely on prudent spending of taxpayer dollars; and (b) both the school board and the state trial court concluded that job targeting did not violate the bidding affidavit as a matter of state law?

2. Is Supreme Court review of "job targeting" appropriate where the case presents unusual circumstances which are not likely to recur?

3. Is Supreme Court review of "job targeting" appropriate where the case is moot in light of the fact that the school construction project is now finished and the disappointed bidder thus could not be awarded the only relief sought by its complaint, an injunction and writ of mandamus to obtain the construction contract?

4. Is Supreme Court review of "job targeting" appropriate where the record consists only of a complaint and answer, and most of the issues urged by the petitioner were neither presented to nor decided on their merits by the courts below because such issues arise from a proposed amended complaint that never became part of the pleadings because the state trial court denied leave to amend on state procedural grounds?

5. Is Supreme Court review of "job targeting" appropriate where the National Labor Relations Board and United States Courts of Appeals have not had an opportunity to consider the preemption issue?

6. Is Supreme Court review of "job targeting" appropriate where the Ohio Court of Appeals applied a well-settled and properly stated rule of law and its decision is consistent with applicable decisions of the Supreme Court, National Labor Relations Board and United States Courts of Appeals?

RULE 29.6 STATEMENT

Respondent The Central Ohio Joint Vocational School District is an Ohio public school district organized and existing for vocational education purposes pursuant to Chapters 3311 and 3313 of the Ohio Revised Code. The School District owns and operates a public joint vocational high school known as Tolles Technical Center in Madison County, Ohio. Under Ohio law, the School District is a public body politic and corporate.

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STATEMENT OF THE CASE

A. What This Case Is Not About

At the outset, it is perhaps more helpful to address what this case is *not* about than what it is about.

Although Petitioner J.A. Croson Company ("Croson") now says this case involves alleged "collusion among bidders" for a public works contract in violation of Ohio's competitive bidding statute (Ohio Revised Code § 3313.46), *such allegations are nowhere to be found in Croson's complaint.* The complaint neither cites the Ohio competitive bidding statute nor even mentions the statute generically. Croson's complaint also nowhere alleges that the successful bidder, Respondent Fox Mechanical Company ("Fox"), colluded with *any other bidder.* In fact, at the hearing of this case before the trial court, counsel for Respondent School District specifically challenged Croson to identify even one other bidder with whom Fox allegedly colluded. Croson was silent in response. [Transcript of Proceedings, April 5, 1994].

The *only* issue presented to the trial court by Croson's complaint was whether the successful bidder, Fox, "colluded" with a *non*-bidder, the Plumbers Union, in violation of a bidding *affidavit* (not a statute) that Fox submitted with its bid. The trial court entered judgment on the pleadings against Croson on this issue on both state law grounds and federal preemption grounds. It was not until *after* this adverse ruling that Croson sought to amend its complaint to include allegations about "other bidders" and alleged statutory violations. But Croson's amended complaint never became part of the pleadings because the trial judge *denied* leave to amend, a decision fully within the judge's discretion under Ohio law. [Pet. App. 22a].[1]

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1. *See, e.g., Wilmington Steel Products, Inc. v. Cleveland Electric*

(Cont'd)

This case thus is not about a state competitive bidding statute; it merely concerns one bidder's affidavit on one construction project. This case is not about "collusion among bidders" but merely a "job targeting" arrangement between one bidder and a non-bidder that Croson claimed was "collusive" but the trial court ruled was not as a matter of state law. Croson understandably now wants to make this case into something it never was, but it is much too late for that.

B. What This Case Is About

Respondent The Central Ohio Joint Vocational School District (the "School District") is an Ohio public school district which owns and operates a public vocational high school known as Tolles Technical Center. In early 1994 the School District advertised for bids for a plumbing contract in connection with expansion of its high school facilities. Six bids were received:

Bidder	Bid
Fox Mechanical Company	$277,900
J.A. Croson Company	$293,449
Marco Plumbing & Heating	$297,000
Kirk Williams Company	$299,630
River City Mechanical, Inc.	$350,000
Radico, Inc.	$376,400

Under Ohio law, the School District was vested with discretion either to accept "the lowest responsible bid" or "reject

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(Cont'd)

Illuminating Co., 60 Ohio St. 3d 120, 573 N.E.2d 622 (1991); *Farmers Production Credit Ass'n v. Johnson*, 24 Ohio St. 3d 69, 493 N.E.2d 946 (1986), *cert. denied*, 479 U.S. 1032 (1987). Notably, Croson omitted its actual complaint in the appendix to the petition for certiorari and instead reproduced the amended complaint that never became part of the record because the trial court denied Croson's motion to amend.

all bids."[2] Since the School District was also obligated to spend taxpayer dollars in the most prudent manner, it chose to accept the lowest bid and announced that it intended to award the contract to Fox.

Croson objected. It contended that Fox's participation in a "job targeting" program with Plumbers Union Local No. 189 violated a "non-collusion" affidavit that Fox had submitted with its bid. At Croson's request, the School District conducted a hearing on these allegations and concluded there was no violation of Fox's affidavit.[3] Here again, this decision fell squarely within the School District's discretion under state law, which includes discretion to interpret its own contracting documents (such as the bidding affidavit) to determine if there have been any violations.[4] The School District therefore reaffirmed its decision to award the plumbing contract to Fox. In reaching this conclusion, the School District never sought to favor union or non-union labor; its sole objective was to build its new school for the fewest taxpayer dollars consistent with top quality work.

Croson commenced this action on March 25, 1994 in the Court of Common Pleas of Madison County, Ohio. The only

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2. *See, e.g., State ex rel. Polaroid Corp. v. Denihan*, 34 Ohio App. 3d 204, 517 N.E.2d 1021 (1986); *H.R. Johnson Construction Co. v. Board of Education*, 16 Ohio Misc. 99, 241 N.E.2d 403 (1968).

3. Notably, at this hearing Croson represented to the School Board that Fox did *not* collude with any other bidders. Croson told the School Board that the only alleged "collusion" was between Fox and a non-bidder, the Plumbers Union, because of the job targeting arrangement.

4. *See, e.g., Ach v. State ex rel. Brielmaier*, 43 Ohio App. 525, 183 N.E. 543 (1932) (a public contracting authority's discretion extends to construing its own bid documents when a dispute arises as to their meaning).

claim presented by Croson's complaint was that Fox's bid violated its bidding affidavit because of participation in a job targeting program. The complaint sought only extraordinary relief - injunction and mandamus - to force the School District to award the contract to Croson instead of Fox. On April 5, 1994 the Common Pleas Court conducted a non-evidentiary hearing on Croson's motion for temporary restraining order. By decisions dated April 11, 1994 [Pet. App. 10a] and June 8, 1994 [Pet. App. 22a] the Common Pleas Court ruled against Croson and entered judgment on the pleadings for the School District as a matter of law for *five* reasons.

First, the Common Pleas Court found that as a matter of state law, Croson failed to state a claim for relief because there was no allegation that Fox had colluded with any other bidder. The Common Pleas Court stated: "There is nothing from the presentations of counsel that suggest that competitive bidders (and specifically Fox) have engaged in collusion or combination with each other in an attempt to offer the lowest responsible bid." [Pet. App. 17a].

Second, the Common Pleas Court held, again as a matter of Ohio law, that there is no factual or legal basis to find that job targeting violated Fox's bidding affidavit. The Common Pleas Court held: "[T]here is no basis to find that job targeting constitutes collusion within the affidavit factually or as a matter of law." [Pet. App. 18a]. The court further ruled that "job targeting is not collusive as a matter of law." [Pet. App. 22a].

Third, the Common Pleas Court noted that under Ohio law, the School District's decision to award the contract to Fox could be challenged only for an abuse of discretion. The court found that "Defendant [the School District] probably did not abuse its discretion in accepting Fox's bid." [Pet. App. 18a-19a].

Fourth, the Common Pleas Court found that Croson had an adequate remedy at law, and injunctive or other extraordinary relief thus was unavailable. [Pet. App. 19a-21a].

Finally, the Common Pleas Court held that Croson's claims were preempted by the National Labor Relations Act (the "Act" or "NLRA"), 29 U.S.C. §151 *et seq.* [Pet. App. 16a].[5]

This last ground for the Common Pleas Court's decision became the focal point on appeal. On May 30, 1995 the Court of Appeals for Madison County, Ohio, Twelfth Appellate District, affirmed the Common Pleas Court on preemption grounds. [Pet. App. 1a-9a]. On October 18, 1995 the Ohio Supreme Court denied review. [Pet. App. 24a]. Croson's petition to this Court followed.

SUMMARY OF REASONS FOR DENYING THE WRIT

This case does not present any issues deserving of review by this Court. Croson's petition for writ of certiorari should be denied for five reasons:

1. This case presents unusual circumstances which are not likely to recur. The only claim presented by the complaint was that the successful bidder, Fox, allegedly violated its bidding affidavit (*not* the Ohio competitive bidding statute) by participating in a job targeting program with a *non*-bidder, the Plumbers Union. There is very little likelihood that these

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5. In the Common Pleas Court's June 8, 1994 decision, the court also denied Croson's motion for leave to amend its complaint. The court held: "This Court previously found that job targeting is not collusive as a matter of law. Therefore, plaintiff's proposed amendment would not create a monetary claim predicated on such allegations. The amendment sought would not state a claim for which relief can be granted." [Pet. App. 22a].

circumstances will ever be repeated since the school construction project is now finished and the School District has no plans for further construction or future use of the bidding affidavit in question.

2. This case is moot. Croson's complaint sought only extraordinary relief, injunction and mandamus, intended to force the School District to award the plumbing contract to Croson instead of Fox. The construction project is now finished and the School District has no plans for new construction. There is no set of circumstances under which a court could now issue an injunction or writ of mandamus for Croson to obtain a plumbing contract for work that is *already done* and will *not* be repeated. There is also very little likelihood that these circumstances (much less the same controversy involving the same parties and same alleged injuries) will ever occur again. This case is thus moot.

3. This case is not appropriate for review by this Court because the record is undeveloped. The trial court decided this case as a matter of law on the pleadings. There was no presentation of evidence or development of a factual record. In fact, not only is the record undeveloped, but most of the issues now urged by Croson were not even presented to or decided on the merits by the courts below. Most of Croson's arguments before this Court are based on Croson's *proposed* amended complaint which never became part of the pleadings because the trial judge *denied* leave to amend. The record in this case is thus insufficient for consideration of the constitutional supremacy issues urged by Petitioner.

4. This case is not appropriate for review because the National Labor Relations Board and the United States Courts of Appeals have yet to address the preemption issue raised by job targeting programs. Currently, the National Labor Relations

Board is considering Section 7 preemption because of job targeting as a result of an Administrative Law Judge's recommended decision in *Manno Electric, Inc.*, NLRB No. 15-CA-11891, 1994 NLRB LEXIS 542 (July 20, 1994). The Court should await the NLRB's decision and insight into the issue, and also should allow the United States Courts of Appeals the opportunity to rule on appeals of NLRB decisions.

5. This case is not appropriate for review because the Ohio Court of Appeals' decision applies a well-settled and properly stated rule of law and is consistent with applicable decisions of this Court, the United States Courts of Appeals and the National Labor Relations Board. The Ohio court correctly applied this Court's doctrine of *Garmon* preemption since the job targeting program which Croson attacks is protected under Section 7 of the NLRA as concerted activity for the purpose of mutual aid and protection. The cases cited by Croson are distinguishable since they involve either federal laws which are not subject to the Supremacy Clause of the United States Constitution or laws which do not prohibit concerted activity. Since the Ohio court properly applied the rule of law, this Court should deny the petition.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS AN UNUSUAL SITUATION WHICH IS NOT LIKELY TO RECUR.

The rules of this Court provide that a petition for writ of certiorari "will be granted only for compelling reasons." Supreme Court Rule 10. As Justice Brennan explained, this requires much more than just the presence of a "federal question" somewhere in the case:

> But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed. *First*, the federal question must be a substantial question. *Second*, the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. *Third*, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law. But whether there is a substantial question and whether it was properly raised in the state courts and whether, even so, the state court decision can be rested on an independent state ground are not always easy questions. The parties differ on one or more of them and we of the Court are not always in agreement.

[Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar. Assn. Q. 393, 399-400 (1960)].

For purposes of review by this Court, a federal question is neither "substantial" nor "compelling" if the case involves unique circumstances or issues which are not likely to be repeated. *See, e.g., Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (noting that the Court only reviews issues that are "beyond the academic or the episodic"); 13 *Moore's Federal Practice* ¶ 810.21 (1995) (the Court will not be inclined to review "an issue that is unlikely to recur" or "results from a unique factual situation"). Unique circumstances are what we find here. Although Croson now wishes to characterize this case much differently, the fact remains that in the state courts, this case merely involved one bidder's affidavit on a one-time school

construction project. The only issue presented by Croson's complaint was whether Fox's participation in a job targeting program with the Plumbers Union violated Fox's bidding affidavit. The School District, acting within its authority under state law, has already concluded there was no violation of the affidavit, and the Ohio Common Pleas Court agreed on state law grounds. The school construction project itself is now completed, and the School District has no plans for further construction. And in any event, it is most unlikely that the School District would use the same bidding affidavit again in light of all the unnecessary litigation that this particular affidavit has created.

The issues presented by this case thus are limited to the affidavit of one bidder on one particular construction project. It is very unlikely these circumstances will ever arise again. Certiorari should therefore be denied.

II.

THIS CASE IS MOOT IN LIGHT OF THE FACT THAT THE SCHOOL CONSTRUCTION PROJECT IS NOW FINISHED.

The circumstances presented by this case are not only unique and unlikely to recur, they are actually moot. Croson's complaint sought only injunctive and other extraordinary relief to force the School District to award the plumbing contract to Croson instead of Fox. It is now too late for such relief in any event. The construction project is finished, the new school is open and operating, and there are no plans for the School District to undertake any new construction.

It is well-settled that an actual controversy must exist at *all* stages of the case, including at the appellate level. If events

subsequent to the filing of the case eliminate the dispute, the case should be dismissed as moot. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983); *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975). As this Court has explained, "mootness [is] the 'doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980), quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1384 (1973).

Whatever standing Croson may have had at the commencement of this case no longer exists. At this juncture, it would be impossible for any court to render a decision that would allow Croson the extraordinary relief sought by its complaint. Since construction is finished and the new school is now open, there is simply no set of circumstances under which Croson could obtain a contract for work that is *already done*. *See, e.g., Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084, 1094 (6th Cir. 1981) ("It is now too late for injunctive relief to be effective because at oral argument, we were informed that construction of the . . . [project] was substantially complete. Accordingly, we dismissed as moot Owens' claims for injunctive relief. For the same reason, we also dismissed as moot the claim for mandamus.")[6]

This plainly is *not* a case which is "capable of repetition yet evading review." For this doctrine to apply, "there must be a

6. It should also be noted that Croson's claims are moot as a matter of Ohio law as well. *See, e.g., Armstrong/Mahan Joint Venture v. Ohio Department of Administrative Services*, Case No. 92AP-970, 1993 Ohio App. LEXIS 1568 (Ohio App. 1993); *Peer Review Systems Inc. v. Ohio Bureau of Workers' Compensation*, Case No. 92AP-436, 1992 Ohio App. LEXIS 6117 (Ohio App. 1992).

reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the *same* complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (emphasis added). There further must be a likelihood that the *specific* injury will occur again. *Preiser, supra*, 422 U.S. at 401-02. Neither of these elements is present here. The School District has no plans for future construction. Even if the School District undertakes further construction at some future point, it would be wholly speculative to assume that Croson or Fox would bid for the contract, or that any union bidders would be involved with a job targeting program. It would be even more speculative to assume that the specific alleged injury here — Croson placing second in the bidding due to the successful bidder's participation in a job targeting program — would recur. And, as noted earlier, even if the School District undertakes further construction, it is even more unlikely it would use the same bidding affidavit again.

Thus, this case is now moot and there is no likelihood that these circumstances will ever arise again. Certiorari should therefore be denied.

III.

THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE THE RECORD IS UNDEVELOPED AND MOST OF THE ISSUES NOW URGED BY PETITIONER WERE NOT PRESENTED TO OR DECIDED BY THE COURTS BELOW.

Certiorari also should not be granted in this case because the record is undeveloped and inadequate for review by this Court. As Justice Frankfurter wrote:

> A decision may satisfy all these technical requirements and yet may commend itself for

> review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy.

[*State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950)].

The record in this case is minimal. The trial court rendered its decision solely on the pleadings. There was no trial, no evidentiary hearing, no discovery or depositions, and no affidavits except for a meager "verified" complaint. As a result, this Court would be left with only the complaint to derive the factual background of this matter.[7] Even Croson is dissatisfied with its complaint; it filed a motion to amend, which was denied.

It is apparent that the pleadings do not contain sufficient factual development to provide a record for the issues on which Croson seeks review by this Court. For example, although Croson now claims that this case centers on job targeting programs, the only explanation of job targeting in the record comes from the "notice pleading" allegations of the complaint and one law review article attached to the petition. The record does not contain one iota of fact about communications between contractors and the union, nor does it even include the collective bargaining agreement alleged to be the very basis for job targeting in this case.

Not only is the record undeveloped, but most of the issues

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7. While legal issues have been litigated, the facts have not. The School District denied many of the factual allegations of the complaint in its answer. For purposes of granting judgment on the pleadings, the trial court assumed the allegations contained in the complaint to be true. Croson thus asserts as "fact" in its petition many things that are mere allegations. Accordingly, Croson asks this Court to consider constitutional supremacy virtually in the abstract.

now urged by Croson were not even presented to the courts below. The trial court's judgment on the pleadings was based on Croson's original complaint, which merely alleged violation of an affidavit (not a statute) based upon an alleged job targeting arrangement between a bidder (Fox) and a non-bidder (the Plumbers Union). The complaint nowhere alleged violation of the Ohio competitive bidding statute or collusion among bidders themselves. These issues were not raised by Croson until *after* the trial court's adverse ruling, when Croson sought to amend its complaint. But the proposed amended complaint never became a part of the pleadings because the Common Pleas Court denied Croson's motion to amend as a matter of state procedural law.

Despite this, most of the issues urged by Croson before this Court arise from its *proposed* amended complaint, not from the pleading that was the subject of the decisions below. Although some of the issues presented by the original complaint and the proposed amended complaint may overlap, the fact remains that the proposed amended pleading is *not* the subject of the judgment on appeal. It seems apparent that this Court should not review claims which were never made part of the pleadings and thus never decided on their merits by the state courts.

If and when this Court considers preemption of state law with respect to job targeting programs, it should have before it a record which contains the pertinent collective bargaining agreement as well as testimony or properly admitted evidence which describes job targeting. That is *not* this case. While job targeting may be of interest to the Court, taking this case would require it to decide the issue in the abstract. As Justice Frankfurter wrote, "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants." *Rice v. Sioux*

City Memorial Park Cemetery, 349 U.S. 70, 74 (1955). Review of abstract arguments is exactly what Petitioner seeks here. The Court should therefore deny the petition for writ of certiorari.

IV.

THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE THE NATIONAL LABOR RELATIONS BOARD AND UNITED STATES COURTS OF APPEALS HAVE NOT HAD AN ADEQUATE OPPORTUNITY TO CONSIDER THE ISSUES REGARDING JOB TARGETING.

Justice Frankfurter also wrote, "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). It would be premature for this Court to consider the issues presented in this case.

The National Labor Relations Board is currently considering the issue of preemption of state law based on job targeting. The Administrative Law Judge issued his decision in *Manno Electric, Inc.*, NLRB No. 15-CA-11891, 1994 NLRB LEXIS 542 (1994), on July 20, 1994, based on a full evidentiary record. Exceptions were filed on September 19, 1994, and the case is now pending before the Board itself. In that case, Manno, a non-union contractor, filed a state court suit against a union claiming that it participated in a job targeting program with the "intent of injuring and restraining the trade of Manno Electric." The Administrative Law Judge held:

> Whether the Plaintiff may pursue a state lawsuit based on such a claim depends on whether the "job targeting program" is

> protected by the Act . . . Section 7 provides that employees shall have the right "to engage in other concerted activities for the purpose of . . . other mutual aid or protection." The objectives of the "job targeting program" are to protect employees' jobs and wage scales. These objectives are protected by Section 7. Thus, the plaintiff's suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a)(1) of the Act. The claims which Plaintiff sought to press were preempted.

[1994 NLRB LEXIS 542 at *68-*69].

The Court should await the NLRB's decision in *Manno Electric* and hence the Board's reasoning on how job targeting programs fit under Section 7. The NLRB, after all, is the agency to which "Congress has entrusted administration of the labor policy for the Nation . . . armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959). As this Court has held:

> We have often reaffirmed that the task of defining the scope of §7 "is for the Board to perform in the first instance as it considers the wide variety of cases that come before it," *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference, *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB v. Hearst*

Publications, Inc., 322 U.S. 111, 130-131 (1944).

[*NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 829-30 (1984)].

Further, the United States Courts of Appeals need time to consider the relationship of the Act to job targeting programs. Croson cites only to *state* court decisions on job targeting. The United States Courts of Appeals should have the opportunity to rule on appeals of NLRB decisions, taking into account the Board's view of Section 7 implications. The Courts of Appeals will address and resolve many of the perceived conflicts with precedent that Croson alleges. If not, this Court should at least have the benefit of the Courts of Appeals' analysis in cases with fully developed records. As Justice Stevens wrote in *McCray v. New York*, 461 U.S. 961 (1983), in denying petitions for writs of certiorari, "Further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date." Review here should be denied so that the NLRB and the United States Courts of Appeals have time to conduct their necessary and beneficial analysis of the issues.

V.

THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE THE STATE COURT DECISION APPLIES A PROPERLY STATED RULE OF LAW AND IS CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT, THE UNITED STATES COURTS OF APPEALS AND THE NATIONAL LABOR RELATIONS BOARD.

The Ohio Court of Appeals based its decision on well-settled principles of federal preemption as announced by this Court. In fact, the Ohio Court of Appeals actually quoted the key holding of this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), that "[w]hen it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield." Croson's complaint thus is *not* that the Ohio court created new law, but merely that it supposedly misapplied a properly stated rule of law. *Compare* Supreme Court Rule 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). As explained below, the Ohio Court of Appeals not only applied a properly stated rule of law but also reached the correct result under the circumstances of this case.

Job targeting programs, as described by Croson itself, are protected activities under Section 7 of the NLRA, which allows employees the right to engage in "other concerted activities for the purpose of . . . mutual aid or protection." Despite Croson's argument that this case is about union contractors, Croson's own allegations put union *employees* at the heart of job targeting and

thus at the heart of its complaint—they pay into a fund to get the benefits of the program. [Complaint ¶¶ 14 and 19].[8] As the Administrative Law Judge held in *Manno Electric*, these activities are protected by Section 7 and preemption thus applies. *Manno Electric, supra*, 1994 NLRB LEXIS 542 at *68. To hold otherwise would risk a state court prohibiting job targeting while the Act — the "supreme law of the land" — protects such conduct.[9]

Job targeting is also not "deeply rooted in local feeling and responsibility" so as to create an exception to *Garmon* preemption. *Garmon*, 359 U.S. at 244. A state prohibition of job targeting would be similar to other bans on concerted activities, such as state antitrust laws. With respect to Ohio's antitrust law, this Court held:

> We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks

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8. *See Richardson v. Kruchko & Fries*, 966 F.2d 153, 156 (4th Cir. 1992) ("[S]tate-law claims are subject to *Garmon* preemption even when the defendant is neither a union, an employer, nor the employer's agent. Whether state-law claims are preempted under *Garmon* is determined not by the identity of the party against whom the claims are asserted, but rather by the *issues* that those claims require a court to adjudicate" (emphasis in original)). As indicated in Point III, *supra*, the record in this matter is less than satisfactory, as it would be useful for this Court to have facts about job targeting beyond the self-serving allegations of the Complaint.

9. Thus, this case is distinguishable from *Belknap, Inc. v. Hale*, 463 U.S. 491, 510-11 (1983), in which the Court held that the state court action could be maintained without interfering with an NLRB determination of the matter within its jurisdiction.

> specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects . . . , it is for Congress, not the States, to provide it.

[*Local 24 of Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. Oliver*, 358 U.S. 283, 297 (1959)].

The preemption here is distinguishable from a number of prevailing wage cases cited by Croson.[10] First, the federal cases regarding the Davis-Bacon Act (40 U.S.C. § 276 *et seq.*) are not contrary to *Garmon* preemption; they simply do not address it, perhaps because the parties never raised the issue. *See, e.g., Building & Construction Trades Dept., AFL-CIO*, 40 F.3d 1275 (D.C. Cir. 1994); *International Brotherhood of Elec. Workers, Local 357, AFL-CIO v. Brock*, 68 F.3d 1194 (9th Cir. 1995). Of course, Davis-Bacon cases would treat preemption differently, as only a federal statutory matter, whereas here Croson's Ohio law claim is subject to preemption under the Supremacy Clause of the United States Constitution.

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10. It is interesting that Croson brings up prevailing wage law at this late stage when the Complaint does not allege a violation of Ohio's Prevailing Wage Law, Ohio Revised Code Chapter 4115. In its brief to the Court of Appeals, Croson expressly claimed that, "[t]his case is *not* a prevailing wage case." (Appellant's Brief p. 12) Thus, Croson's reliance on "prevailing wage" cases is misguided, illustrating once again that this case is a poor candidate for review. In their article attached to the Petition, Northrup and White overemphasize the significance of this case by mischaracterizing it as being about the preemption of "Little Davis-Bacon Acts" when that is simply not true in light of the Complaint, Croson's claims and the Court of Appeals decision. *See* Herbert R. Northrup and Augustus T. White, *Subsidizing Contractors To Gain Employment: Construction Union "Job Targeting,"* 17 U.C. Berkeley J. of Emp. & Labor Law 62 (January 1996).

Croson's other authorities are also easily distinguishable. In *General Electric Co. v. New York State Dept. of Labor*, 698 F. Supp. 1093 (S.D.N.Y. 1988), *vacated on other grounds*, 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990), the Court held that New York's prevailing wage statute was not preempted by the Labor-Management Relations Act. The Court distinguished *Oliver* by holding that while an antitrust law would prohibit parties from bargaining, the prevailing wage law does not prohibit such activity but merely sets a floor for what wages can be. This same reasoning applies to other minimum wage standards which do not discourage or encourage collective bargaining or affect the right of self-organization under the Act. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1986); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).[11]

Here, by contrast, Croson wants to apply state law so that unions could not create job targeting programs. By Croson's logic, Ohio law should have the effect of prohibiting the concerted efforts of union employees to set up job targeting programs for their mutual aid and protection. Yet this would obviously impair employees' exercise of their Section 7 rights and violate the Supremacy Clause. *Garmon* preemption is thus inevitable.

Since the Ohio Court of Appeals' decision properly states and follows applicable decisions of this Court, there is no reason for review by this Court.

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11. These cases and *Associated Builders and Contractors of Georgia, Inc. v. City of Atlanta*, No. 1:94-CV-2012-ODE, 1995 WL 606778 (N.D. Ga. Aug. 5, 1995), are also distinguishable from the instant case since they did not involve *Garmon* preemption. Since the causes of action did not raise issues under Sections 7 and 8, the Courts went on to consider other preemption doctrines, such as that described in *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

CONCLUSION

For all of the foregoing reasons, Respondent The Central Ohio Joint Vocational School District respectfully requests the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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